

39. Cost-of-Service. Under a cost-of-service approach, the reasonableness of a cable system's rates would be determined by examining of the particular costs of the individual cable system using ratemaking principles set by the Commission. The primary advantage of a cost-based alternative is that it would permit close supervision of rates. As discussed above, a primary disadvantage is that it would be more burdensome on cable systems and regulatory authorities. We assess more fully the advantages and disadvantages of cost-of-service regulation below in paragraphs 53-61.

40. As indicated, we have tentatively concluded that cost-of-service regulation should not be adopted as the primary mode of cable rate regulation, but that it could nonetheless have a place in our regulatory framework for cable operators seeking to justify rates higher than would be considered reasonable under the benchmark standard we could adopt to regulate cable rates. In the following sections, we discuss specific benchmarking and cost-based alternatives for regulating rates. In addition to the benchmarking alternatives, we solicit comment on another alternative called the "Direct Cost of Signals Plus Nominal Contribution to Joint and Common Costs" for regulating basic service tier rates, discussed at paras. , infra. We solicit comment generally on which among our specific proposals should be incorporated in our comprehensive framework for regulating basic rates, or how they could be combined to govern rates for the basic service tier. We also seek comment on how these proposals might be modified to achieve more effectively the goals of Section 623(b) of the Cable Act of 1992. We also solicit comment on whether we should consider adopting alternative approaches to determining the reasonableness of rates for the basic service tier, from among which either the cable system or the regulatory authority might have some discretion to choose.

aa. Benchmark Alternatives

41. Rates charged by systems facing effective competition. One potential benchmark would be defined using the average of rates currently charged by systems facing effective competition, as the Cable Act of 1992 defines that term. This benchmark would appear to meet the statutory goal of "protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."⁷¹ To use a benchmark based on rates charged by systems facing effective competition, however, the Commission would first have to identify those systems. Moreover, basic service tier rates of systems facing effective competition would reflect the different numbers of channels in different systems' basic tiers. To perform the necessary computations the Commission would thus need to know, at a minimum, the basic service tier rates and the number of channels in the basic tier for systems facing effective competition. This information would permit us to compute a single average rate. We might then define the benchmark to be the

⁷¹ Communications Act §623(b)(1).

sum of computed average plus an additional amount defined by a percentage selected by the Commission of that average. Alternatively we could define a per channel benchmark using those data. Refining this process, we could instead group these systems based upon the number of channels in their basic tiers and then compute a simple average rate for each group.⁷²

42. To create benchmarks that more accurately reflect conditions facing individual systems, the Commission might seek to determine how rates vary with cost characteristics of the systems facing competition. If sufficient data were available, regression analysis or some other statistical technique could be used to determine how rates varied with such characteristics affecting costs as homes passed per mile, number of channels, number of subscribers, the relative mix of buried and overhead cable, and the other factors described in Section 623(b). With this information, we could create a benchmark formula based upon systems subject to effective competition that shared at least some of the regulated systems' underlying cost characteristics. The ability of the Commission to arrive at an appropriate benchmark formula using systems subject to effective competition will, however, depend upon, among other things, the number of systems in competitive markets, and our ability to collect and analyze data on these systems within the limited time allotted to complete this rulemaking. Whether it is appropriate to employ a benchmark based on the rates of systems facing effective competition to govern the rates of cable systems generally will also depend upon whether the systems facing effective competition are representative of cable systems in their costs and other characteristics.

43. We request comment on the feasibility of using the rates charged by cable systems facing effective competition to define a benchmark for basic service tier rate regulation. In particular, we request any information commenters can assemble on systems in competitive markets and on the sources of data that might be used to develop a set of benchmarks based upon their rates.⁷³ Are there any characteristics of some "effectively competitive" markets or the systems that operate in them that differ from other systems or markets to an extent that would make them unsuitable for consideration in establishing the benchmark? We also ask whether it would be desirable and feasible to adjust this benchmark based on the costs of systems subject to it, and whether we have data to do so. If not, what other methods might be used to make such adjustments? Commenters are invited to suggest and comment on methodologies for making such adjustments.

44. Past regulated rates. A second alternative would be to develop a benchmark for basic service tier rates based on rates charged in 1986 before the Cable Communications Policy Act of 1984 effectively

⁷² For example, if systems subject to effective competition reported between 5 and 33 channels in their basic tiers, we could group all systems with 10 or fewer channels together; those with 11 to 20 together; and those with more than 30 together.

⁷³ For a discussion of the potential difficulties associated with identifying these systems, see the discussion supra at paras. 17-18.

prohibited local rate regulation of most cable systems. It may be acceptable to assume that rates in 1986 were reasonable because they resulted from a competitive bidding process for the franchise and subsequent rate adjustments were made under local franchise authority oversight. Using these data we could develop individual benchmark rates for systems operating in 1986 based upon the 1986 per-channel rate for their lowest tiers.⁷⁴ As in the previous case, some adjustment might be made in individual cases for factors generally agreed to affect costs. We could also permit an adjustment upward from 1986 rates based on construction and rebuild costs incurred by the cable system since that time. We solicit comment on the appropriate treatment of construction and rebuild costs incurred since 1986 if we adopt a benchmark based on past regulated rates. For systems not operating in 1986 we would propose a benchmark expressed on a per-channel basis to account for differences in the number of channels offered on the basic tier and based on the per channel rates of the systems operating in that year.

45. We request comment on the advantages and disadvantages of using a benchmark based on past regulated rates. If such a benchmark were used, would it be better to base it on rates charged by individual systems, or on an average of rates for all systems, or on some other formula? If we were to use this type of benchmark, would a starting year other than 1986 be preferable for any reason? Are there factors, other than inflation, that might cause per-channel rates from 1986 to be inappropriate in 1993? Should we permit cable systems to select a starting year prior to 1986? How might our proposed benchmark formula be adjusted to capture the effects of these other factors? We also request information on what data are available on rates charged in this period that might be used to compute such a benchmark. Would data from the General Accounting Office surveys of cable rates be adequate to compute a reasonable benchmark?⁷⁵ Are any data available that would allow estimation of the effects of various cost elements (particularly the elements enumerated in Section 623(b)(2)(C) of the Act) on prices? How might that data reflect the cost elements specifically described in the Act? Commenters are invited to submit data that will enable us to determine whether benchmarks based on lowest tier rates prior to deregulation would lead to rates reasonable to both consumers and operators.

46. Average rates of cable systems. A third alternative would use data for all cable systems operating in 1992 to develop a benchmark from the average per-channel rate for their lowest service tier. Per-channel rates would be considered reasonable if they did not exceed that average by more than some fixed amount. Systems whose rates exceeded the average rate for all systems by more than a specified amount, or by more than a specified

⁷⁴ For example, the benchmark per channel rate could be an individual system's 1985 basic tier per channel rate adjusted by using changes in the Consumer Price Index (or a service price index) between 1985 and 1993 to capture the effect of inflation in the intervening years.

⁷⁵ U.S. General Accounting Office, National Survey of Cable Television Rates and Services, GAO/RCED-89-193, August 1989. See also House Report at 31-33 (discussing 1989, 1990, and 1991 GAO reports).

percent, or systems which ranked among the highest few percent (e.g., top 2-5%) in terms of rates would be assumed not to have rates that were reasonable. Thus, this benchmark would identify those systems whose rates were unusually high or substantially above the average.

47. This standard would have the advantage that data would be more readily available for calculating the benchmark, and consumers would be protected against rates far exceeding the general industry practice. Unadjusted, however, the benchmark would not reflect competition but merely average performance in the industry; if monopoly profits were reflected in the rates of at least some industry segments, they would be incorporated in the average rate. In addition, over time the average rates would be affected by regulation and would cease to be an independent measure of industry performance. Nonetheless, at least in the initial period following passage of the Cable Act of 1992, national average rate data might be readily available and appropriate for defining an initial set of benchmark rates. We request comment on the validity of a measure based on average industry rates. We also inquire as to the best source of data for calculating the benchmark if such a standard were adopted.

48. Cost-of-Service Benchmark. Under this approach to developing a benchmark, we would use engineering, operating, programming and other cost data gathered in this rulemaking to construct the costs of an "ideal" or "typical" cable system or systems, possibly on a per channel or per subscriber basis. As with other benchmark alternatives, we could establish a single national benchmark for all cable systems, several benchmarks reflecting significant characteristics of cable systems, or a formula for calculating benchmarks, including cost differences across different geographic areas. This approach could produce a benchmark roughly related to cost without requiring detailed examination of actual costs of individual systems. For this reason, this approach might be a useful alternative if implementation of other benchmark alternatives proves infeasible to implement. We seek comment on the feasibility and desirability of developing and applying a benchmark based upon constructing "ideal" or "typical" system costs. Parties supporting this approach should submit specific and detailed cost data to be included in such a benchmark, along with detailed information about how the data were developed, including data sources, validity, and reliability.

49. Price Caps. A price cap benchmark would be a formula set by the Commission to define reasonable increases in rates for the basic tier. For this reason, we would not intend to use the price cap formula to assess initially whether a system's rates were reasonable. The price cap formula would instead govern changes to rates that have been found reasonable under some other alternative, either based upon cost-of-service or another benchmark alternative.

50. A price cap formula permits the regulated company to adjust its prices when certain variables contained in the price cap formula change. For example, in the price cap regime governing the interstate service rates of AT&T and the large local telephone companies, price ceilings are periodically revised to reflect easily observable changes in costs generally

lying beyond company control. The ceiling can also be lowered to reflect industry or nationwide gains in productivity and raised to allow for inflation. As for AT&T and the telephone companies, under the price cap alternative each cable system could have a different rate cap determined by the prescribed formula. The price cap formula would apply to an existing rate and would control changes to the cable system's prices over time. We solicit comment on the price cap alternative generally and whether we should make it a component of a comprehensive regulatory scheme for rates. Is a price cap approach consistent with the intent and legislative history of the statute? Could the Commission reasonably arrive at a price cap methodology for an industry that historically has not been subject to rate regulation? Are certain characteristics of the cable industry less conducive to price cap regulation than other industries? We ask for comment generally on whether the price cap model applied to AT&T and the telephone companies is appropriate for the cable industry, and, if not, what modifications should be made to it should we adopt a price cap alternative for regulation of the basic service tier.

51. The Commission has found the price cap approach to be an attractive alternative to cost-of-service regulation in the telephone industry. Under a price cap, companies have an incentive to reduce costs and operate efficiently. It avoids the perverse incentives of rate of return regulation under which, for example, more expense can mean higher rates, not less profit. Price caps also minimize regulatory intervention and thus the cost to government and to the companies dealing with government. With its emphasis on prices, a price cap alternative permits companies reducing costs faster than the industry, or the nation as a whole, to earn higher profits than other companies. We ask for comment on whether the Cable Act of 1992 would require a company earning such profits to reduce its rates. We also ask for comment on whether we should permit a price higher than the cap for companies demonstrating that their costs are increasing faster than the industry or national average.

52. If we adopt a price cap alternative to govern rates for the basic tier, we would propose to define and to control rate changes permitted under this alternative. We would additionally need to determine how and when to revise the cap, and to select an appropriate price index to include among permitted adjustments. An overly rigid price cap formula could frustrate cable operators' ability to meet subscribers' needs. We seek comment on whether and, if so, how a price cap formula might accommodate rate adjustments to reflect: changes in subscriber penetration, channel capacity, the nationwide level of prices, the relative contribution of regulated revenues to total cable revenues, franchise fees and requirements, and other factors relevant to the Act's regulatory objectives.⁷⁶ We seek comment on how directly changes in cable operating costs are captured or reflected by

⁷⁶ The relative contribution of regulated revenues to total cable revenues could become an increasingly significant factor if cable operators elect to use their distribution plant also for personal communications services or to lease their excess capacity for telecommunications services. See, e.g., Into the Fibersphere, George Gilder, Forbes, December 7, 1992..

changes in the Gross National Product- Producer Index (GNP-PI) and whether another index would more accurately reflect inflation's impact on cable operations.⁷⁷ Also, we seek comment on how the price cap should be adjusted to reflect additions or reductions to the number of channels included on the basic tier. For example, is an adjustment based on short term incremental cost changes a reasonable standard or would another test better achieve the goals of the statute?

bb. Individual System Cost-Based Alternatives

53. Direct Costs of Signals plus Nominal Contribution to Joint and Common Costs. Under this alternative, the Commission would prescribe guidelines for basic service tier rate regulation by the local franchise authority that used an individual system's costs to define reasonable rates. Cable systems would be required to keep their accounting records according to generally accepted accounting principles (GAAP) and to provide those records, as requested, to the local franchising authority.⁷⁸

54. The franchise authority would be required to find reasonable basic service tier rates that allowed recovery of at least the direct costs of the channels in the basic tier.⁷⁹ We envision that the major component of such direct costs would be programming costs, including both payments to cable networks and retransmission fees to broadcast stations. Allowing cable systems to pass the former costs through to subscribers might reduce operators' incentives to remove highly-valued programming from the basic tier.⁸⁰ Not allowing operators to pass on programming costs might force operators to provide the basic tier at a loss and require them to make up the loss on other programming services. Whatever equipment used and operating costs incurred to activate additional individual channels in this tier would also be covered.

55. In addition, the rates for the basic service tier would include a nominal contribution to the joint and common costs of the system as a whole.⁸¹ Under the statute, basic service tier rates can recover "only

77 See para. 38, supra.

78 See note 84 infra.

79 Because rates determined using this alternative would not necessarily permit full recovery of basic service tier costs, it would generally not offer cable operators relief from benchmark rates that the operators believed were confiscatorily low. Therefore, this alternative would not be suitable for use as a "safety valve" mechanism by which cable systems could seek to justify rates higher than a benchmark rate.

80 We note that such a pass-through is contemplated in the legislative history of the Act. See, e.g., House Report at 82.

81 Communications Act, Section 623(b) (2) (C) (iii), 47 U.S.C. Section. 543(b) (2) (C) (iii). See also Conference Report at 63.

such portion of the joint and common costs . . . as is . . . reasonably and properly allocable to the basic service tier."⁸² This requirement would set an upper bound on basic service tier rates that could be considered reasonable under Commission guidelines. Within this limit, the Commission has several options for treatment of joint and common costs in basic service tier regulation. The Commission could set guidelines that resulted in rates that recovered far less than the fully distributed cost of providing the service in order to provide assurance of service for lower-income viewers.⁸³ This would likely lead to a basic service tier composed primarily or solely of local broadcast channels and public, educational, and governmental channels. Alternatively, the Commission could set guidelines that would permit higher basic service tier rates in order not to discourage offering of a broader basic service tier with a larger number of channels, including popular cable channels. This alternative would, however, require more elaborate cost allocation rules. Rules that the Commission might apply to the allocation of joint and common costs, and to the determination of allowable costs, are proposed in Appendix A.⁸⁴ The Commission might also leave to the franchise authority some discretion in setting the level of basic service tier rates, as long as they recovered at least the direct costs

⁸² 47 U.S.C. Section 543(b) (2) (c) (iii).

⁸³ The Commission and the states have established mechanisms to provide "Lifeline" service for lower-income telephone subscribers. These mechanisms seek to ensure access for lower income telephone subscribers by lowering the monthly recurring charge for basic telephone service and recovering costs that would otherwise be charged to such subscribers from interexchange carriers on a per-line charge for interstate costs and by varying mechanisms for intrastate costs.

⁸⁴ Some of the alternatives that we present for regulating cable service rates are cost based. The Cable Act of 1992 could be interpreted to permit, while not mandating, cost-based regulation of some or all aspects of rates of cable service. See Communications Act §623(b) (2) (c) (including direct costs of signals and joint and common costs as factors in determining reasonable basic tier rates); Communications Act §623(b) (3) (basing rates for equipment on actual costs); Communications Act §623(c) (2) (including capital and operating costs as a factor in determining unreasonable rates for cable programming service). In order to assure that local franchising authorities and the Commission would be able to implement cost-based regulation, if that regulatory alternative is adopted for some or all aspects of cable service, this NPRM proposes simplified cost accounting requirements for cable systems. These cost accounting requirements, set forth in Appendix A, are based on Generally Accepted Accounting Principles (GAAP), and should be simple for cable systems to use and regulatory authorities to administer. They would be adequate to implement the cost-based regulatory alternatives that we describe in the rulemaking, but would not be necessary for other non-cost-based alternatives. If we adopt a regulatory alternative that does not rely on cost-based regulation we may not adopt these proposed cost accounting requirements. We solicit comment on these proposed simplified cost accounting requirements.

of the basic service tier channels but no more than those costs plus a maximum share of joint and common costs permitted by Commission rule.

56. We request comment on the above proposal to adopt Commission guidelines for cost-based basic service tier rate regulation. We request comment on the appropriate criteria for setting basic tier rate ceilings, and on the amount of discretion we should accord local franchise authorities in setting basic service tier rates.

57. Cost of Service. Under this alternative, a cable system's rates would be reviewed using the established standards of cost-of-service regulation traditionally applied to public utilities, including common carriers providing interstate communications services. The broad principles of cost-of-service regulation are well established.⁸⁵ While these principles could be implemented in a rigorous fashion with extensive cost-accounting requirements, we believe such an approach would be inconsistent with legislative intent.⁸⁶ For this reason, we propose to use simplified cost accounting requirements described in Appendix A if cost-of-service regulation becomes a component of our comprehensive model for regulating cable rates.

58. Like the other alternatives, cost-of-service regulation has advantages and disadvantages. Companies can meet service demand because service revenues may be set to cover operating expenses and capital costs. Yet, since cost-based rates only compensate for the cost of providing service, if the cost-of-service regulation is properly applied, companies cannot extract monopoly rents from consumers. On the other hand, cost-of-service regulation gives regulated companies little incentive to be efficient, to improve service, or otherwise to make regulated service more attractive to consumers. Cost-of-service regulation also imposes high costs on the regulators and regulatees. It forces companies to devote substantial resources to participating in the regulatory process, burdening them with accounting and reporting requirements. We are concerned that cost-of-service accounting may require a significant (and potentially expensive) departure from current industry accounting practices. We seek comment on the relative advantages and disadvantages of applying cost-of-service regulation to the basic tier.

59. Because of its disadvantages, we tentatively conclude that cost-of-service regulation should not be the primary method of regulating rates for basic tier service if the record that we gather in this proceeding

⁸⁵ See, e.g., Bluefield Water Works v. PSC, 262 U.S. 679 (1923) and FPC v. Hope Natural Gas, 320 U.S. 591 (1944) (Bluefield/Hope).

⁸⁶ The statute requires the Commission in establishing regulations for the basic service tier to seek to reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission. Communications Act, §623(b)(2)(A), 47 U.S.C. §543(b)(2)(A). See also House Report at 83.

will support a benchmark alternative.⁸⁷ Our preferred approach would be for rates to be governed generally by a benchmark, with cable operators permitted to attempt to justify higher rate levels based on cost-of-service ratemaking principles. Under the cost-of-service approach, the local franchising authority, or the Commission where the local authority's application for certification has been denied or its certification has been revoked, would apply cost-of-service ratemaking principles to determine whether the cable system's rates for its basic tier service are reasonable, based on showings made by each cable operator.⁸⁸ We solicit comment on these tentative conclusions.

60. We additionally seek comment generally on the impact of cost-of-service regulation on the cable industry. We ask how such regulation would affect the ability of cable operators to expand their channel capacity and program offerings. We also seek comment on the implications of cost-of-service ratemaking on the industry's ability to recover its investment, including goodwill, and to service its current capital debt. We request comment on whether we would need to include transition mechanisms if we were to adopt a cost-of-service regulatory model. We also seek comment on whether cost-of-service regulation would require cable operators to deaverage rates for franchise areas served by a common cable system in circumstances where cable operators now average rates on a system-wide basis, and the impact of this deaveraging on both the cable industry and subscribers. We seek comment on the optimal degree of cost averaging and the feasibility of establishing system-wide basic tier rates.

61. If cost of service ratemaking is used as a "safety net" to allow cable operators to defend rates challenged under a benchmark test, we believe that the efficiency of the appeal process could be greatly enhanced by establishing standards for the showings that should be made in such an appeal process. We note that cost-of-service regulation requires the regulatory authority to make determinations relating to four major cost components: rate base, the cost of capital, depreciation, and operating expenses. It also generally requires rules to govern the design of rates once determinations have been made in these four areas. In order to establish standards for the showings that should be made by cable systems

⁸⁷ This conclusion is fully supported in the legislative history of the Act. See, e.g., House Report at 83 ("The FCC should create a formula that is uncomplicated to implement, administer, and enforce, and should avoid creating a cable equivalent of a common carrier 'cost allocation manual.'").

⁸⁸ As we discuss at para. 48, supra, cost-of-service principles could be applied to representative industry cost data to design cost-of-service benchmarks, avoiding consideration on an individual basis of the costs of every cable company subject to regulation. This approach assumes the availability of sufficient representative industry cost data. This Commission sets a single cost of capital for interstate access for 1,400 local exchange telephone companies. Some 700 small local exchange carriers file rates based not on their own actual costs, but on an average cost schedule.

seeking to defend rates higher than the benchmark, we propose to adopt guidelines in each of these areas. We solicit comment on what requirements we would need to adopt in these areas and on the impact on the cable industry and subscribers of those requirements. We set forth in more detail in Appendix B the issues in each of these four areas that would require resolution for cost-of-service regulation to be implemented, and solicit comment on those issues.

d. Regulation of Rates for Equipment

i. Statutory Requirements

62. The Cable Act of 1992 directs the Commission to establish standards for setting, on the basis of actual cost, the rate for installation and lease of equipment used by subscribers to receive the basic service tier, including converter boxes and remote control units, and installation and lease of monthly connections for additional television receivers.⁸⁹

ii. Proposals

63. Based on the language and legislative history of Section 623(b)(3), we tentatively conclude that Congress intended to separate rates for equipment and installations from other basic tier rates. The statute itself addresses rates for equipment used to receive basic tier service and related installation in a subsection separate from those dealing with cable service rates. The statute requires cable companies to base their rates for this equipment and installation on actual costs, while cost is only one of several factors we are directed to consider in determining rates for basic tier or cable programming services. We also tentatively conclude that, to be consistent with the statute's intent, the rates for installation should not be bundled with rates for the lease of equipment. We believe that this unbundling could help to establish an environment in which a competitive market for equipment and installation may develop.⁹⁰ We seek comment on these tentative conclusions, especially on the feasibility of a competitive market for installation services.

⁸⁹ Communications Act § 623(b)(3), 47 U.S.C. § 543(b)(3).

⁹⁰ This would be consistent with Section 17 of the Cable Act of 1992, which requires us to adopt regulations "to promote the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes." Communications Act § 624, 47 U.S.C. §544. We recognize, however, that installation by those unaffiliated with the cable operator might increase theft of service, and we seek comment on safeguards which might alleviate this problem. We also recognize the potential signal leakage problem posed by third-party wiring of homes for cable, which we intend to address in the proceeding on home wiring. Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, Notice of Proposed Rulemaking, FCC 92-500 (released Nov. 6, 1992).

64. Although we tentatively conclude that equipment covered under this section of the Act includes the converter box, remote control unit, connections for additional television receivers, and wiring other inside cabling,⁹¹ we seek comment on the extent of this coverage.⁹² We believe that our rules should clarify the relationship between Section 623(b)(3), which requires regulating, on the basis of actual cost, "equipment used for the basic tier," and Section 623(c), requiring regulations for cable programming services, which includes the installation or rental of equipment used for the receipt of such programming services. For the latter, the Commission must establish standards for determining whether the rates are unreasonable and, as for basic tier service, cost is to be only one of several factors to consider.

65. On the one hand, it appears that Congress may not have intended to limit regulation, on the basis of actual cost, to that equipment only used for basic tier service. For example, Section 623(b)(3)(A) specifically lists an addressable converter box needed to access video programming on a per-channel or per-program basis among the equipment subject to the actual cost standard.⁹³ On the other hand, the Act includes equipment and installation in the definition of cable programming services.⁹⁴ If we assume that Congress intended different standards for determining the reasonableness of rates for equipment used to receive cable programming

⁹¹ The requirement that cable systems base rates for inside cabling on actual costs may affect the charge to a customer who discontinues service. See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, Notice of Proposed Rulemaking, FCC 92-500 (released Nov. 6, 1992).

⁹² We solicit comment on whether Section 623(b)(3) would apply to equipment used to receive audio services if offered as part of the basic tier. We also tentatively conclude that equipment used by a cable operator to trap programming so that a subscriber can receive only basic tier service is not subject to Section 623(b)(3) because this equipment is not intended for direct use and control by the subscriber. We request comment on this tentative conclusion and whether any other equipment exists that is covered under this provision of the Act. See Indecent Programming on Cable Access Channels Proceeding at para. 9 (discussing lock boxes to block certain leased commercial access programming).

⁹³ In addition, the legislative history indicates a change in wording from "equipment necessary by subscribers to receive the basic service tier" in the original House bill, to "equipment used by subscribers to receive the basic tier." The Conference Report says that this language is meant to give the Commission greater authority to protect the interests of the consumer. Conference Report at 64.

⁹⁴ In fact, the definition of cable programming service was amended in conference to include installation and lease of equipment. See Conference Report at 66.

services, it is unclear how to treat equipment that is used for the provision of both basic tier service and cable programming services. Therefore, we request comment identifying any equipment not used for basic tier service and the extent to which the actual cost standard of Section 623(b)(3) controls the rates charged for equipment used for more than just basic tier service. We solicit comment on whether the only equipment that should be subject to Section 623(b)(3) should be equipment that is necessary to receive basic service tier programming, and whether equipment, if any, used only to receive cable programming services would not be subject to Section 623(b)(3).

66. We propose requiring operators to base charges for equipment covered by Section 623(b)(3) on direct costs,⁹⁵ and indirect cost allocations, including reasonable general administrative loadings and a reasonable profit. Cable operators would amortize the costs of equipment over the average life of that equipment to determine the monthly equipment rate. The cost of maintaining and servicing equipment should be factored into leased rates for equipment.⁹⁶ If the Commission adopts a cost-of-service showing requirement for basic tier rates, cable companies could allocate a share of the general administrative overhead expenses on the same basis that they allocate to basic tier services, which would simplify the rate setting process for equipment.⁹⁷ If we adopt the proposal that basic tier rates include only a nominal contribution to overhead, it is unclear whether the same loading should apply to equipment. It appears that Congress intended low rates for equipment and installation, but Congress might have intended actual costs to include a share of joint and common costs allocated using a fully distributed cost methodology. We seek comment on which allocation rule would more accurately reflect congressional intent concerning rates for equipment covered by Section 623(b)(3).

⁹⁵ A cable operator may determine direct costs for equipment in several manners. One option is to use the invoice price to the operator of the equipment actually used by the customer. Another possibility is to use the cost of all equipment acquired in one year (or another appropriate period of time) and allocate these costs among individual customers. A third alternative would be to develop a benchmark by taking an average (national or regional) of equipment costs for cable operators similar to a benchmark approach for regulating the basic tier. We believe that the last alternative would require that high cost operators be given the opportunity to justify higher than average rates. We seek comment on which of these alternatives strikes the optimal balance among our goals of simplicity, satisfying the actual cost standard, and fairness for consumers and operators.

⁹⁶ The House Report says that actual cost includes normal business costs such as depreciation and service. House Report at 83. However, a separate charge for servicing equipment might encourage a competitive market for equipment repair.

⁹⁷ If basic tier rates are not based on costs plus overhead loadings, companies would have to make a separate showing of overhead expenses to be allocated to equipment, which could be burdensome.

67. Alternatively, cable operators may wish to sell equipment to their customers.⁹⁸ The sale may occur as a one-time payment or over a period of time. The Act, however, appears to contemplate that cable operators would be limited to recovery of actual costs, however we define that term. We recognize that actual costs may vary depending on the length of payment schedule. The purchaser would probably be independently responsible for repair of the equipment, unless a service contract were also purchased. In addition, cable operators may have a competitive advantage as an alternative market for cable equipment develops because customers will not have or may not know of other equipment suppliers. Therefore, we ask whether customers purchasing on time from the cable operator should be permitted to change their minds and purchase equipment from an alternative source. If this occurred, the cable operator would have to discontinue that customer's monthly equipment charge, but the equipment could be sold or leased to another customer as used equipment at a rate reflecting recovered costs. We seek comment on this alternative.

68. We propose determining the actual costs for installation on the same basis as for equipment. Because we believe that this determination will require allocating many joint and common costs (e.g., the amount of time or the number of trucks used for installations versus other company functions), we propose not to prescribe any allocation rules but rather to require the cable operator to bear the burden of showing that its implementation of those general allocation rules is reasonable.⁹⁹ To the extent that installation costs have traditionally been recovered through a one-time charge, and because the length of time a subscriber will continue service is unpredictable, it appears reasonable that companies be permitted to continue recovering these costs as one-time charges.¹⁰⁰

69. The Commission recognizes that costs for installation will vary depending on whether the dwelling has inside cabling already.¹⁰¹ It may thus be more reasonable to require two installation rates, one for previously

⁹⁸ Although the statute refers to the lease of equipment, this alternative assumes that Congress's main concern was preventing customers from paying for equipment many times over through monthly rental fees. See House Report at 83-84.

⁹⁹ We have indicated that if the cost-based regulation alternative discussed above becomes part of our comprehensive regulatory framework, we intend also to adopt some simple allocation rules. If we adopt such rules for cost-of-service rate regulation, we would propose that they also apply for determining the actual costs of equipment and installation covered by Section 623(b)(3).

¹⁰⁰ On the other hand, we do not intend to require that these costs be recovered through a one-time charge. Cable operators would be free to recover those costs through a series of monthly charges.

¹⁰¹ Whether the franchise has matured might be an important factor because dwellings are more likely to have been wired previously.

wired dwellings and one rate for new inside cabling. This could encourage competition, especially for simple installations (or customers could do it themselves).¹⁰² We request comment on whether costs vary enough to reasonably require cable operators to develop two separate rates for installation or use an average rate and whether that decision should be left to the discretion of the local franchising authority. Should there also be provision for a surcharge when the distance between a customer's premises and the operator's distribution plant is substantial? Commenters supporting such a surcharge should discuss when its application would be reasonable and also how it should be calculated.

70. Many operators charge less than actual costs for service installation as part of their marketing efforts. We seek comment on whether §623(b)(3) reflects a legislative intent to prohibit such promotional offerings. Or can the continuation of these promotional offerings be harmonized with the "actual cost" language of section 623(b)(3)? We also ask whether promotional offerings can increase cable service penetration, thereby resulting in economies of scale that could reduce costs overall of providing equipment to subscribers. We ask whether it would be consistent with congressional intent to therefore permit certain types of promotional offerings. Finally, we ask whether the actual cost provision of the statute is contravened if individual promotions do not fully recover costs as long as provision of equipment in general does recover "actual costs."

71. Section 623(b)(3)(B) also specifically directs the Commission to establish, on the basis of actual cost, rates for installation and monthly use of connections for additional television receivers. We tentatively conclude that cable operators should use the same cost methodology they use for installation of other equipment to calculate the rates for installation of connections for additional receivers.¹⁰³ If additional connections are installed at the same time a subscriber's initial service is installed, we propose that cable operators be limited to recovering the incremental costs of the additional installation. We request comment on the costs associated exclusively with providing connections for additional television receivers. We tentatively conclude that the cost of cabling used for additional connections should be recovered through one-time charges or charges that would end when the operator had recovered those costs. We specifically request comment identifying any costs associated with technical requirements, such as boosting a signal, involved in providing additional connections.

e. Costs of Franchise Requirements

i. Statutory Requirements

¹⁰² But see note 90, supra for a discussion of problems that may result from third party installations.

¹⁰³ We seek comment on difficulties associated with splitting a signal for additional connections that might require that only cable operators provide installations.

72. The statute requires that regulations governing the basic service tier shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.¹⁰⁴

ii. Discussion

73. We have tentatively concluded that the purpose of this statutory requirement is to assure the establishment of standards that will permit the cable operator to identify on subscriber bills pursuant to Section 622(c)(2) the amount of the bill attributable to franchise requirements.¹⁰⁵ We do not interpret this section as mandating that we establish separate cost-based charges apart from those for the basic service tier generally for either the customer or the users of public, educational, and governmental channels for costs attributable to franchise requirements. We solicit comment on this tentative conclusion. We further tentatively conclude that we should require that the costs attributable to satisfying franchise requirements should include (1) any direct costs of providing any services required under the franchise, (2) the sum of per channel costs for the number of channels used to meet franchise requirements for public, educational, and governmental channels, and (3) a reasonable allocation of overhead. In Appendix A we set forth accounting and cost allocation requirements that could be used with the cost-based regulatory alternatives for regulation of rates for cable service. Should we at least in part adopt a cost-based regulatory alternative, we propose to require that the per channel costs and allocation of overhead for purposes of implementing Section 622(c)(2) be determined in accordance with the proposed accounting and cost allocation requirements set forth in Appendix A. If we do not adopt a cost-based regulatory alternative, we propose to require that cable systems use reasonable methods to determine per channel costs and allocations of overhead. We solicit comments on these proposals.

f. Customer changes.

i. Statutory Requirements

74. The Cable Act of 1992 requires that regulations for the basic tier also include standards and procedures to prevent unreasonable charges for changing equipment or service tiers. Charges for changing the service tier must be based on cost.¹⁰⁶

ii. Proposals

¹⁰⁴ Communications Act, §623(b)(4), 47 U.S.C. §543(b)(4).

¹⁰⁵ See para. 175, *infra*. for our proposals to implement amendments to Section 622(c).

¹⁰⁶ Communications Act § 623(b)(5)(C), 47 U.S.C. § 543(b)(5)(C).

75. It appears that that Congress broadly intended to protect subscribers from unreasonable charges for changes in service tiers.¹⁰⁷ We tentatively conclude, therefore, that regulations adopted to implement Section 623(b)(5)(C) should apply to any changes in the number of service tiers that are initiated at the subscriber's request after installation of initial service.¹⁰⁸ We tentatively propose to require that charges for changing service tiers not exceed a nominal amount "when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method."¹⁰⁹ The Commission seeks comment on whether and, if so, at what level we should set the nominal amount when this condition is met. We also seek comment on what constitutes "similarly simple methods," as that term is used in the statute.

76. To otherwise assure that subscribers do not pay unreasonable charges for changes in service tiers not made by coded entry on a computer terminal or by other simple methods, we solicit comment on two alternatives. First, we could require that charges be based on the actual costs of making service tier changes at the subscriber's request, including any direct costs and a reasonable allocation of indirect costs and overhead and a reasonable profit. This would assure that cable operators recover the costs of making customer changes plus a reasonable profit from the charges for that activity, but this could result in higher charges to subscribers than our second alternative. Under the second alternative, as for changes effected by coded entry on a computer terminal, we could require that charges for changes in services tiers effected by other means recover only nominal costs. This could help to keep charges for changes in service tiers low, but could increase burdens and costs on cable operators for this activity by encouraging subscribers to order service changes more frequently. In addition, it would require that costs of customer changes be recovered from other services. We solicit comment on the advantages and disadvantages of these alternatives, and whether Congress intended cable operators to make a reasonable profit on changes in service tiers.

77. We similarly solicit comment on applying these alternatives

¹⁰⁷ See House Report at 84.

¹⁰⁸ In paras. 12 and 13, *supra*, we solicit comment on whether Congress intended for there to be a single basic service tier that the subscriber must purchase as a precondition of ordering other programming. We tentatively conclude here that rules adopted pursuant to Section 623(b)(5) should apply to any changes in service tiers after installation of initial service regardless of whether we adopt a final conclusion that Congress intended for there to be a single basic service tier that the subscriber must purchase as a precondition of ordering programming.

¹⁰⁹ Communications Act § 623(b)(5)(C), 47 U.S.C. § 543(b)(5)(C).

to define reasonable charges for changing equipment.¹¹⁰ Should we select the first alternative for equipment, we observe that the charge for a change in equipment would be generally based on actual cost, *i.e.*, direct costs plus an allocation of indirect costs and a reasonable profit. See para. 66, *supra*. We seek comment on whether Congress intended for cable operators to make a reasonable profit on changes in equipment. We also seek comment on our tentative conclusions and proposals relating to customer changes and on how best to implement them.

78. In addition, we request comment on whether the implementation of this rulemaking could encourage customers to change service tiers. Subscribers may wish to alter their service should cable operators re-tier their programming to create a less expensive or fewer channeled basic tier or because of anti-buy-through provisions. We solicit comment on whether costs associated with initial re-tiering should be treated in a different manner from subsequent customer changes in service.

g. Implementation and Enforcement.

i. Statutory Requirements

79. The Cable Act requires that our regulations regarding basic service rates include procedures for implementation by cable operators, for enforcement by franchising authorities, and for our expeditious resolution of disputes between cable operators and franchising authorities. We must also establish regulations to assure that subscribers are informed that basic service, as defined in Section 623, is available to them and that a cable operator notify franchising authorities 30 days in advance of any proposed increase in rates for the basic service tier.¹¹¹

ii. Discussion

80. We seek comment on an expeditious way to trigger initial review of a cable operator's current basic tier rate once a local franchising authority has been certified to regulate those rates. One alternative would be to require that the operator file its schedule of basic tier rates with the franchising authority within a relatively brief period, *e.g.*, after receiving notice¹¹² from the authority that it has been certified by this Commission. Under this alternative, the authority would have a relatively brief period, but one still permitting meaningful review, to consider the schedule. Upon expiration of this time, the rates would be presumed reasonable absent a negative finding. This would be analogous to our procedures for reviewing common carrier tariffs, which must be completed

¹¹⁰ We solicit comment on whether Congress intended for Section 623(b) (5) to apply to changes in equipment generally or only to changes in equipment associated with changes in service tiers.

¹¹¹ Communications Act, §§ 623 (b) (5), (6), 47 U.S.C. §§ 543 (b) (5), (6).

¹¹² See *supra* para. 24.

within 120 days.¹¹³ We believe the same deadline should apply to review of both an operator's initial filing and any later-filed proposed rate increases and service changes that involve rate increases. Without such a deadline, a franchising authority could by inaction delay new services reaching the public and deny a reasonable price change which could be critical to an operator's ability to serve the community. We seek comment on this proposed approach.

81. Section 623(b) (6) requires 30 days' notice of proposed increases in basic service rates.¹¹⁴ We might infer from this language not only that a franchising authority is expected to review rate increases, but also that if the authority does not render a decision within this period, the proposed increase would automatically become effective. We observe that Section 623(a) requires that basic tier rate proceedings provide a reasonable opportunity for consideration of the views of interested parties. It would be difficult for interested parties to file and the local authority to consider their pleadings all within a 30-day period. Thus, we seek comment on whether an additional period of time should be granted for a franchising authority to review proposed rate increases and, if so, what time period would best balance the need for expedition with the need to render an informed and judicious rate determination.

82. Another alternative would be to establish relatively brief notice periods (e.g., 60 or 90 days) after which an increase would become effective unless a franchising authority had rejected it, but also to allow for the tolling of the franchising authority's deadline in particular circumstances. For example, the deadline might be suspended for complex cases where the franchising authority needs additional information from the cable operator before it can render a decision. The disadvantage to this second alternative is that it might deprive the public of new services and the operator of a reasonable price increase for long periods of time. We also observe that in some areas, a franchising authority's rate determination may be subject to review by a higher level of local or state authority, further delaying a final determination.

83. A third possibility, therefore, might be to permit rate increases to go into effect automatically after the 30-day notice period expires, subject to refund if the franchising authority ultimately determines the increase to be unjustified. This alternative would permit ample time for interested parties to present their views. It could, however, undercut the intent of Congress -- as expressed in the legislative history of the Act -- to protect consumers' interests against potentially unreasonable rate increases.¹¹⁵ We seek comment on these various alternatives, on any others commenters suggest for implementing basic tier rate regulation, and particularly on the time constraints that should govern determinations on

¹¹³ 47 C.F.R. § 61.58, 47 U.S.C. § 203(b) (2).

¹¹⁴ Communications Act, § 623(b) (6), 47 U.S.C. § 543(b) (6).

¹¹⁵ See House Report at 82.

proposed rate increases. We also seek comment on whether, depending on the ratemaking methodology adopted, certain price changes caused by factors outside the operator's control, e.g., increases in taxes or programming costs, should not be deemed price "increases" subject to the notice requirement, and should be permitted to be passed through without prior regulatory review. Those advocating such an approach should fully discuss its relationship to the ratemaking methodology they recommend.

84. We seek comment on how to achieve expedition in ratemaking procedures while at the same time ensuring that all parties receive the due process to which they are entitled. To ensure that interested parties have an adequate opportunity to comment, we propose to require that an operator notify subscribers in writing of a proposed rate increase at approximately the same time it notifies the franchising authority, i.e., at the billing cycle closest to 30 days before any proposed increase is effective. We also propose to permit any interested parties, including subscribers, to participate in the local authority's ratemaking decisions.¹¹⁶ We seek comment on this proposal, on what the appropriate pleading cycle might be, and on how such a cycle could be harmonized with the statutory goal that disputes between cable operators and franchising authorities be resolved expeditiously. We ask whether we should require the operator, for its initial filing and any subsequently proposed rate increase, to show that its submission complies with Section 623 and our implementing regulations. Placing the burden of demonstrating compliance on the operator could expedite decision-making, as the operator possesses the factual information necessary for such a demonstration.

85. Given the statutory emphasis on expedition, we do not propose to provide for formal hearings on proposed rate increases or rate-related disputes. We also propose to require the authority to issue written decisions explaining its disposition of each rate increase request. We propose also to adopt rules allowing local authorities to obtain additional information from operators requesting a rate increase and to establish proprietary information procedures analogous to those proposed below for cable programming service complaints. We seek comment on these tentative conclusions and proposals. We also ask interested parties to comment on what oversight procedures franchising authorities may need to ensure compliance with the Cable Act.

86. When franchising authorities regulate rates for basic cable service consistent with the Act, they would be in the best position to monitor an operator's compliance with our rate regulations. Consequently, we tentatively find that enforcement of cable regulation should occur at the local level in these circumstances. We seek comment on whether a franchising authority has the power under the Cable Act, if it denies a rate increase, to set a rate for basic cable service itself, or whether formulation of a new

¹¹⁶ The Act requires franchising authorities to certify that their rate regulation procedures "provide a reasonable opportunity for consideration of the views of interested parties." Communications Act, § 623 (a) (3) (C), 47 U.S.C. § 543 (a) (3) (C).

rate should be left to the cable operator. We also seek comment on whether, in the event an operator should fail to comply with a rate decision, the Cable Act gives an authority the power to order refunds, or whether the authority must obtain an order from a court or other governmental entity with the power to order refunds. In order to obtain a refund, would an authority have to employ special procedures to ensure that the due process rights of an operator were not violated?¹¹⁷ We also seek comment on what forms of relief would be available under local law. For those authorities with franchise agreements that do not provide for rate regulation, could franchise agreements be revoked or not renewed for lack of compliance with rate decisions? We seek comment on whether other remedies, such as fines, would be available under state or local law. We also seek comment on whether the FCC could impose forfeitures upon cable operators failing to comply with local authorities' determinations that were consistent with our basic service rate regulations.¹¹⁸

87. We invite interested parties to comment on the appropriate forum for appeals of local authorities' rate decisions. One approach would be to rely on the local courts, and not this Commission, to resolve what is essentially a local dispute between an operator or subscriber and a franchising authority. An alternative would be for this Commission to resolve such disputes. This approach might assure a more uniform interpretation of the standards and procedures adopted pursuant to the Cable Act. We seek comment on these alternatives. In particular, we ask whether the jurisdictional framework of the Cable Act permits us to exercise jurisdiction over an authority's rate regulation decision in the absence of our disallowing or revoking its certification.¹¹⁹

88. We also seek comment here on whether, when we assert our jurisdiction in cases of revocation or disallowance, we should apply the same procedures to basic service rate petitions as those we would apply to cable programming services complaints;¹²⁰ whether we should apply procedures more closely analogous to those proposed for local franchising authority's regulation of basic service rates; or whether some combination of the two would be most appropriate.

89. The Cable Act also requires that we establish rules to assure that operators inform subscribers that a basic service tier is available.¹²¹ We tentatively conclude that we should require the operator to give initial written notice of basic tier availability to existing subscribers within 90 days or three billing cycles from the effective date of our rules governing

117 See infra para. 109.

118 47 U.S.C. § 503(b) (2).

119 See supra paras. 15-16.

120 See infra paras 97-110.

121 Communications Act, § 623(b) (5) (D), 47 U.S.C. §543(b) (5) (D).

cable rates. Additionally, we propose to require operators to notify subscribers in any sales information distributed prior to installation and hook up and at the time of installation.¹²² We seek comment on this proposal. We also seek comment on the appropriate format and content of any such notice.¹²³ In addition, we seek comment on any other means by which we can ensure that subscribers receive meaningful notice of basic tier availability.

4. Regulation of Cable Programming Services

a. Regulations Governing Rates

i. Statutory Requirements

90. The statute requires that the Commission establish criteria for identifying, in individual cases, rates for the acquisition and distribution of cable programming services that are unreasonable.¹²⁴ The statute provides that in establishing such criteria the Commission must consider:

- (1) rates for similarly situated systems taking into account similarities in costs and other relevant factors;
- (2) rates of systems subject to effective competition;
- (3) the history of rates for the system including their relationship to changes in general consumer prices;
- (4) the systems' rates as a whole for all cable services;
- (5) capital and operating costs of the system; and
- (6) advertising revenues.¹²⁵

The statute also permits the Commission to consider other relevant factors.¹²⁶

ii. Discussion

¹²² See generally 47 C.F.R. Section 76.66(c) (under now obsolete A/B switch rules, information on availability of switch required by date certain, at time of installation, and annually thereafter.)

¹²³ See generally, 47 C.F.R. Section 76.66(c) (describing information which notice of A/B switch availability must contain.)

¹²⁴ Communications Act, § 623(c) (1) (A), 47 U.S.C. § 543(c) (1) (A).

¹²⁵ Communications Act, § 623(c) (2), 47 U.S.C. § 543(c) (2).

¹²⁶ Communications Act, § 623(c) (1) (A), 47 U.S.C. § 543(c) (1) (A).

91. We tentatively conclude that the statute intends for the Commission to establish criteria to govern the determination in an individual case of whether rates for cable programming service are unreasonable based on a reasoned balancing of the factors enumerated in the statute and other factors that the Commission in its discretion may choose to consider. We tentatively conclude that the statute affords the Commission substantial discretion in establishing these criteria. We solicit comment on this analysis and on whether we should give any of the statutory factors primary or greater weight than others.¹²⁷ We also solicit comment on what factors other than those enumerated in the statute we should consider in establishing the criteria called for in the statute.

92. We have already described regulatory approaches and alternatives that could be adopted to govern rates for the basic service tier. With the exception of the "Direct Costs of Signals/Nominal Contribution to Joint and Common Costs" alternative, all could also be used to determine in individual cases whether rates for cable programming service are unreasonable.¹²⁸ For example, a benchmark based on the rates for cable programming service of systems subject to effective competition could be used in an individual case to judge whether the rates of the system are unreasonable: if they were higher than the benchmark they would be presumed unreasonable. We believe that the advantages and disadvantages of the regulatory approaches and alternatives that we discussed for basic tier

¹²⁷ The statute requires the Commission to establish regulations that assure that rates for the basic service tier are reasonable, whereas for cable programming services we must establish standards that permit identification in individual cases of rates that are unreasonable. We solicit comment on whether this difference in statutory language creates a different standard of reasonableness for the basic service tier and for cable programming services. We ask whether our regulations identifying unreasonable cable programming services rates will necessarily define the "reasonable" rates for such services as well and, therefore, whether Congress instead intended more of an "egregious" standard for cable programming services. We solicit comment on the extent to which our regulations should produce lower rates for higher tier services than those generally in effect at the time of enactment of the Cable Act of 1992. If so, we solicit comment on what balancing of the statutory factors for cable programming services would accomplish that result.

¹²⁸ The "Direct Costs of Signals, Nominal Contribution to Joint and Common Costs" approach is not feasible for tiers higher than the basic tier. Requiring only a nominal contribution to joint and common costs from higher tiers would require the cable operator to seek a larger contribution from the basic tier, or from the premium channels and/or pay-per-view. Larger contributions to overhead from pay-per-view, with its smaller unstable subscriber base, would threaten the operator's ability to recover operational costs or any reasonable profit. Requiring larger contributions from the basic tier would conflict with congressional intent that rates for the basic tier be kept low. See Conference Report at 63.

service are equally applicable to cable programming service.¹²⁹ As with the basic service tier, we tentatively conclude that traditional cost-of-service regulation would not be the best alternative to select as the primary method of regulating rates for cable programming services. We seek comment on this tentative conclusion and on which alternatives we should incorporate in the comprehensive plan we will adopt for regulating cable programming service rates. Parties suggesting modifications to proposed alternative or different alternatives to those discussed above should explain how their proposal better meets the objectives set forth in the Cable Act of 1992 in general and Section 623(c) in particular.

93. We posed many questions about each of the alternatives presented in the subsection discussing basic tier rate regulation. Those questions were designed to identify the optimal regulatory structure for assuring reasonable rates for basic tier service. We ask commenters to indicate whether their answers to those questions would be different if a given alternative were being applied to cable programming service. We additionally ask how each alternative could be implemented if a cable operator had more than one tier of cable programming services. Also, we ask commenters to discuss which combination of alternatives for regulating the basic tier and for cable programming services will best serve statutory objectives.

94. We are aware that we must balance (a) the need to ensure that cable rates are not reasonable and do not include monopoly rents, against (b) the need to ensure that cable systems earn a reasonable return so that they can continue to attract capital necessary to operate and to expand the services they provide to their subscribers. To the extent that local or state regulation of basic rates constrains the revenue and profits obtained from the basic tier, cable operators may seek to earn relatively more revenue and higher profits on their programming services beyond the basic tier. Hence, there may be a tradeoff between the severity of the restrictions that may be placed on basic tier rates and rates for other programming services. We seek comment on whether we will be confronted with such a tradeoff and, if so, how it can best be made in our cable rate regulations. In particular, we solicit comment on the extent to which regulations designed to produce low rates for the basic service tier require permitting relatively higher rates for cable programming services.¹³⁰ We also solicit comment on what

¹²⁹ We previously asked what customer equipment, if any, Congress intended to include within the definition of cable programming services. See para. 65, supra. If such equipment is not subject to regulation pursuant to Section 623(b) (3) as equipment used by subscribers to receive the basic service tier, we ask whether the Act contemplates any regulations applicable to such equipment beyond those applicable to cable programming services generally. In particular we seek comment on whether we should adopt uniform rules to govern regulation of rates for equipment used to receive the basic tier and for equipment falling within the definition of cable programming service.

¹³⁰ See discussion at paras. 31-32, supra.

combination of rate regulations applicable to the basic service tier and cable programming services would best promote statutory objectives. Can our regulations be designed to produce low rates for both the basic service tier and cable programming services? Should our regulations intend that cable systems recover most costs and earn most profits from per channel and per event programming?

95. The Cable Act defines "cable programming service" as

any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.¹³¹

Thus, cable programming service encompasses all video "tiered" programming, other than that included in the basic service tier, and would exclude all pay-per-channel or per-program material. As noted in the legislative history of the Cable Act, some cable systems are "experimenting with 'multiplexing' - the offering of multiple channels of commonly-identified video programming as a separate tier (e.g., HBO1, HBO2 and HBO3)." The House Report states that Congress intended for these "'multiplexed' premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate rate tier or as a stand-alone purchase option."¹³² We thus propose to exclude from the definition of "cable programming service," pay-per-channel or pay-per-program services offered on a multiplexed or time-shifted basis. We seek comment on whether, for a tiered offering of a multiplexed premium service to be exempt from rate regulation, the multiple channels offered would have to consist of essentially the same programming offered on a time-shifted basis. We also ask interested parties to comment on how we should define "same programming" for purposes of any such exemption.

96. We also seek comment on the circumstances under which a tier consisting of different premium services, could be subject to rate regulation. If such a tier were offered at a single package price, as opposed to separate charges for each channel, would it automatically be subject to regulation? Would this be so even if the package price were the sum of the charges for each separate channel added together? Assuming that we were to exempt such premium tiers from regulation, does the Cable Act nevertheless require us to regulate the rates of any premium tiers offered at either a discount from, or an added charge to, a price composed of the separate charges for each individual channel?¹³³ To what extent did Congress

¹³¹ Communications Act, § 623 (1) (2), 47 U.S.C. § 543 (1) (2).

¹³² House Report at 80.

¹³³ We address here the scope of the rate regulation provisions of the Cable Act as they relate to the "packaging" of premium channels. We observe that related issues are raised by the Act's prohibition on discrimination in

intend that imposition of rate regulation would influence or limit an operator's discretion to arrange its services in tiers?

b. Complaint Procedures; Rate Reduction and Refund Procedures for Rates Found to be Unreasonable

i. Statutory Requirements

97. The Cable Act requires that we establish "fair and expeditious procedures" for receiving, considering and resolving complaints from "any subscriber, franchising authority, or other relevant State or local government entity" alleging that rates for cable programming services are unreasonable pursuant to our rules. The statute specifically states that we must specify the minimum showing required for a complaint to obtain Commission consideration and resolution.¹³⁴ A complaint is timely only if filed during the 180-day period following the effective date of our regulations governing unreasonable rates for cable programming services or, thereafter, within a reasonable period of time after the cable operator changes its rates. This time constraint on filing complaints also applies to complaints concerning changes in rates that result from changes in the system's service tiers.¹³⁵

ii. Discussion

98. The legislative history indicates that Congress intended our regulations not to be "so technical or complicated as to require subscribers to retain the services of a lawyer to file a complaint and obtain Commission consideration of the reasonableness of the rate in question."¹³⁶ We thus plan to devise procedures that are not only fair to all parties, but are also simple and expeditious.

99. One alternative is to require that complaints concisely state facts showing how an operator has violated our rate regulations. We recognize, however, that the ratemaking methodology we adopt, even if very simple, may not be readily accessible to the ordinary subscriber. In addition, the legislative history indicates that Congress deliberately excluded the requirement that a complaint demonstrate a "prima facie

the anti-buy-through provisions of the statute. Communications Act, § 623 (b) (8) (A), 47 U.S.C. § 543 (b) (8) (A); Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking, MM Docket No. 92-262, FCC 92-540 (released Dec. 11, 1992). We ask interested parties to comment on the interrelationship between these statutory provisions and to suggest a unified approach that would be consistent with the Act's objectives.

¹³⁴ Communications Act, § 623 (c) (1) (B), 47 U.S.C. § 543 (c) (1) (B).

¹³⁵ Communications Act, § 623 (c) (3), 47 U.S.C. § 543 (c) (3).

¹³⁶ Conference Report at 64.